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No. 70-87

Supreme Court
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In the

Supreme Court of the United States

OCTOBER TERM, 1971

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, and RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

Petitioners,

vs.

EARL D. MOSLEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR THE RESPONDENT.

RONALD L. BARNARD
221 North La Salle Street
Chicago, Illinois 60601

HARVEY J. BARNETT
105 West Adams Street
Chicago, Illinois 60603

HAL M. BROWN
120 South La Salle Street
Chicago, Illinois 60603
Attorneys for Respondent

The Scheffer Press, Inc.—ANdover 3-6850

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vs.

EARL D. MOSLEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR THE RESPONDENT.

SUMMARY OF ARGUMENT

The City of Chicago ordinance on its face violates the First Amendment right to freedom of speech because of its over-breadth. Peaceful picketing is protected free speech and only the manner or purpose of picketing may be regulated when required by an overriding state interest. The ordinance is not directed at the manner or purpose of picketing, but rather, it lays down a blanket prohibition against

all picketing (other than labor picketing) within 150 feet of a school, no matter how peaceful, orderly or innocuous, such as the conduct of Respondent. The ordinance thus unconstitutionally sweeps within its broad proscription all forms of picketing, those that are lawful exercises of free speech and those that may be regulated by the state, such as violent or disruptive picketing.

The ordinance violates the Equal Protection clause of the Fourteenth Amendment by creating an invidious arbitrary classification that excludes peaceful picketing involving a labor dispute from its scope. This classification between labor dispute picketers and all others bears no reasonable relationship to the stated goal of the ordinance—to preserve tranquility around schools, as it prevents the admittedly peaceful picketing of Respondent adjoining the school, but permits dozens of teamsters, school teachers or janitors to encircle a school from morning until night. This classification is even more invidious because of its effect upon preferred First Amendment rights of freedom of speech. By this ordinance, the City of Chicago is attempting to pick and choose what views may peacefully be expressed on the public way adjacent to a school in clear violation of the First and Fourteenth Amendments.

STATEMENT OF THE CASE

Respondent sets forth the salient facts to correct certain erroneous portions of Petitioners' Statement of the Case. Petitioners are the Police Department of the City of Chicago, James B. Conlisk, Superintendent of Police, and Richard J. Daley, Mayor of the City of Chicago.

In early September 1967, Respondent, Earl D. Mosley, began peacefully to walk on the public sidewalks adjoining

Jones Commercial High School in Chicago, Illinois carrying a sign which stated that Jones Commercial High School discriminated against blacks. (A. 18, 21) On March 26, 1968, the City of Chicago added a new section to its existing ordinances that turned the peaceful picketing of Respondent into a crime: disorderly conduct.[1] (A. 4, 8) The amendment reads as follows:

> 193-1 A person commits disorderly conduct when he knowingly: * * *
>
> (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school has been concluded, provided, however, that this sub-section does not prohibit the peaceful picketing of any school involved in a labor dispute.

Respondent testified he was concerned about the quality of education for blacks, and he believed that Jones Commercial High School was discriminating against black students in its admission policies and in the treatment that it afforded them.[2] (A. 17-21) After repeated discussions with school officials with respect to discrimination at Jones proved unsuccessful, Respondent turned to peacefully pick-

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[1] At the trial, there was no evidence whatsoever as to why the ordinance was enacted, and nothing on its face is indicative of the legislative intent. The statements throughout Petitioners' brief, and particularly on pages 5 and 8 of the Statement of the Case, that it was enacted as a result of widespread violence and disorders around schools are totally unsupported by the record.

[2] Whether Respondent's opinions were well-founded in fact is not and has never been an issue or relevant in this case, and the comments and insinuations to the contrary on page 6 of Petitioners' brief are clearly inappropriate.

eting the school, generally in the afternoon, either by himself or with a few other persons. (A. 17, 18)

Petitioners admitted that at all times Respondent's activities were peaceful and orderly and his picketing never interrupted the free flow of traffic to and from the school. (A. 11, 31-2) They admitted that Respondent had never caused a disturbance at the school, and they had no reason to believe that his activities would lead to acts which were not peaceful, orderly and quiet.[3] (A. 11, 31-2)

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[3] Petitioners' position that these admissions of fact are "technicalities" (p. 25 of Petitioners' brief) is absurd. Petitioners were requested to admit these facts in accordance with Rule 36 of the Federal Rules of Civil Procedure. The Report of Proceedings on this point reads as follows:

> The Court: That concludes your evidence, does it?
>
> Mr. Young [Attorney for Respondent (Plaintiff)]: Yes.
>
> The Court: You have no evidence to put in?
>
> Mr. Chambers: [Attorney for Petitioners]: The City has no evidence, your Honor. We feel that the arguments are purely legal.
>
> * * * *
>
> The Court: This is all the evidence that you have on behalf of the plaintiff in this case?
>
> Mr. Young: Yes, your Honor.
>
> The Court: As far as you are concerned, the defendant rests?
>
> Mr. Young: Your Honor, I am sorry, I did want to read into the record the request for admissions which we submitted and which are deemed admitted, if I may.
>
> * * * *
>
> The Court: All right, you may proceed to read your requests for admissions into evidence.
>
> Mr. Young: These requests were served on the City and were not responded to and are deemed admitted, your Honor. [The requests for admissions were read into the record]
>
> That is it your Honor.

After the passage of the ordinance, Respondent contacted the Chicago Police and the City's Corporation Counsel. (A. 22, 24) He was advised that he would be arrested if he continued to picket the high school. (A. 22, 24) Petitioners admitted that if Respondent continued his activities in picketing the school, he would be arrested. (A. 10, 31) Respondent sought a declaratory judgment and an injunction to prevent the enforcement of the ordinance on the grounds that it violates his right to freedom of speech under the First Amendment and constitutes a denial of his right to equal protection and due process under the Fourteenth Amendment.

After a trial, the District Court held that this was a proper proceeding for a declaratory judgment and held that the ordinance was constitutional in all respects.

Respondent appealed to the United States Court of Appeals for the Seventh Circuit. On appeal there were no disputed questions of fact; the only issue was whether the ordinance was unconstitutional on its face. On October 29, 1970, the Court of Appeals reversed the District Court and held that the ordinance violated Respondent's First Amendment right to freedom of speech because the ordinance was overly broad. The Court of Appeals did not pass on Respondent's other contentions as to why the ordinance is unconstitutional.

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[3] (cont.)

The Court: They are admitted into evidence. Are there any comments by defense counsel? [Petitioners made no comments with respect to the admissions] (A. 30-32).

At no stage during these proceedings did Petitioners ever take the position that Respondent's activity "might reasonably be expected to lead to acts which were not peaceful, orderly and quiet" as they now state on page 8 of their brief.

ARGUMENT

I.

THE ORDINANCE ON ITS FACE VIOLATES THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF SPEECH.

The Court of Appeals for the Seventh Circuit unanimously held § 193-1(i) of the Municipal Code of the City of Chicago to be "patently unconstitutional on its face". (A. 46) The Court concluded:

> We think it clear that the ordinance is overbroad. It lays down a blanket prohibition against all forms of picketing or demonstrating (other than labor picketing) within 150 feet of a school no matter how peaceful, pristine or innocuous. It prohibits one man carrying a sign from walking on a public sidewalk adjoining a school, without condition or reservation. (A. 44)

In reaching its decision, the Court of Appeals applied the clear principles heretofore established by this Court and found no basis upon which it could uphold the ordinance.

The First Amendment guarantee of freedom of speech which is the basis of the decision below was clearly articulated by this Court in *Thornhill* v. *Alabama,* 310 U.S. 88 (1940). In *Thornhill,* the Court found an Alabama anti-picketing statute to be unconstitutional on its face because its effect was "to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff. . . ." (pp. 98-9)

While the progeny of *Thornhill,* as outlined in Petitioners' brief (pp. 17-22), have permitted the regulation of picketing under certain circumstances not present here,

the basic principle of *Thornhill* remains inviolate—peaceful picketing is beyond governmental regulation. Thus, in the recent case of *Food Employees* v. *Logan Plaza,* 391 U.S. 308, 313 (1968), this Court reiterated the principle declaring:

> We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *AFL* v. *Swing,* 312 U. S. 321 (1941); *Bakery Drivers Local 802* v. *Wohl,* 315 U. S. 769 (1942); *Teamsters Local 795* v. *Newel,* 356 U. S. 341 (1958).

Other recent decisions articulating these principles are *Gregory* v. *City of Chicago,* 394 U.S. 111 (1969); *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969); *Cox* v. *Louisiana,* 379 U.S. 536 (1965) and *Edwards* v. *South Carolina,* 372 U.S. 299 (1963), all holding that peaceful expression of views by picketing, marching or demonstrating is protected by the First Amendment, and *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969), holding that wearing of black armbands on school premises by students to protest the Viet Nam war is protected by the First Amendment.

Respondent, as is clear from the record, engaged in the purest form of peaceful picketing—almost identical to the conduct of Mr. Thornhill. Respondent walked quietly, peacefully and in an orderly manner on the public sidewalk adjoining Jones Commercial High School with a sign protesting what he believed to be the discriminatory racial policies of the school. Petitioners admit that Respondent's conduct was at all times peaceful, orderly and quiet, and that he never interfered with the free flow of traffic to and from the school. Further, they concede that they were

not aware of any disturbance resulting from the conduct of Respondent and that they had no reason to believe that Respondent's picketing would lead to disorderly acts.

It is clear from the foregoing cases that the peaceful picketing of Respondent is protected free speech. The vice of the City of Chicago ordinance is that it prohibits all exercises of free speech through picketing within 150 feet of a school, those that are lawful such as Respondent's peaceful picketing, as well as those that may be legitimately regulated or curtailed by the City, such as violent or disruptive picketing. This Court, on many occasions, has declared such overbroad enactments to be unconstitutional. *Zwickler* v. *Koota,* 389 U.S. 241 (1967); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Schneider* v. *State,* 308 U.S. 147 (1939); *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971).

In spite of the established rule that peaceful picketing is protected free speech, Petitioners persist in arguing that the flat ban on all picketing within 150 feet of a school is constitutionally permissible because picketing is considered free speech "plus". Respondent has never denied that picketing contains "something more and different" than pure free speech *Hughes* v. *Superior Court,* 339 U.S. 460 (1950), and is considered free speech "plus", so that the state may regulate the manner or purpose of picketing when a valid overriding state interest requires such regulation. Justice Frankfurter, speaking for a unanimous Court, succinctly delineated when picketing may be regulated:

> Picketing is not beyond the control of the State if the *manner* in which picketing is conducted or the *purpose* which it seeks to effectuate gives grounds for its disallowance. *Hughes* v. *Superior Court,* 339 U.S. 460, 465-6 (1950) (emphasis added).

This Court has further held that an ordinance regulating picketing must balance the competing interests of the individual's freedom of speech and the interests of the state in maintaining peace and order. *Hughes* v. *Superior Court*, 339 U.S. 460 (1950); *Thornhill* v. *Alabama*, 310 U.S. 88, 105 (1940). Narrowly drafted statutes aimed at regulating specific aspects of the manner or purpose of picketing have been approved by this Court. Thus, in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), this Court upheld a statute which prohibited picketing with the intent of interfering with, obstructing or impeding the administration of justice in or near a building housing a court, stating, "Here we deal . . . with a narrowly drafted statute and *not with speech in its pristine form* but with conduct of a totally different character." (p. 566, emphasis added). Similarly, in *Cameron* v. *Johnson*, 390 U.S. 611 (1968), this Court upheld a statute that only prohibited "picketing . . . in such a *manner* as to obstruct or unreasonably interfere with free ingress or egress to and from any county . . . courthouse. . . ." (p. 612, emphasis added)

In contrast, the Chicago ordinance is all encompassing; it is not limited to either the manner or purpose of picketing which are the "pluses" of picketing that may be regulated. Faced with this fact, Petitioners have taken a broad brush approach in attempting to justify this ordinance. The heart of Petitioners' argument is that because picketing is more than free speech and because the state has an interest in schools, the City of Chicago has an absolute right to create certain boundaries around schools within which all picketing or demonstrations may be proscribed, no matter how peaceful or innocuous. Petitioners' entire argument ignores the fundamental principles cited above—peaceful picketing is protected free speech and *only* the unlawful manner or purpose of picketing may be regulated.

The City of Chicago cannot abridge, deny or fetter purely peaceful picketing as it has blatantly done by this enactment.

Significantly, Petitioners cite no authorities which support the conclusion that peaceful picketing, absent an improper manner or illegal purpose, may be proscribed, as indeed there are none.[4] Every case relied on by Petitioners is distinguishable from the case at bar because in each case cited by Petitioners, the *purpose* of the picketing was unlawful (*Carpenters Union* v. *Ritter's Cafe*, 315 U.S. 722 (1942); *Bakery and Pastry Drivers Local* v. *Wohl*, 315 U.S. 769 (1942); *Giboney* v. *Empire Storage Co.*, 336 U.S. 490 (1949)) or the *manner* of the picketing was improper (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287 (1941)).[5]

In *Teamsters Union Local 595* v. *Vogt, Inc.*, 354 U.S. 284 (1957), relied on by Petitioners and quoted extensively on pp. 20-21 of their brief, this Court upheld a state court injunction against certain labor picketing solely because of its unlawful purpose. However, Justice Frankfurter concluded the opinion by stating:

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[4] Even the opinion of the Supreme Court of Illinois in *Rockford* v. *Grayned*, 46 Ill.2d 486 (1970) does not support Petitioners' position. That opinion did not discuss the constitutionality of the ordinance under the First Amendment as this question was apparently not argued to (except on rehearing) or considered by the Illinois Court.

[5] In *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, this Court held only that the Illinois Supreme Court could conclude that in view of the prior violence of the union that was enjoined, even peaceful picketing was coercive; thus, the manner was subject to regulation.

> Of course, the mere fact that there is "picketing" does not automatically justify its restraint without an investigation into its conduct and purposes. *State courts, no more than state legislatures, can enact blanket prohibitions against picketing.* (pp. 294-5, emphasis added)

Petitioners place particular reliance on *Cox* v. *Louisiana*, 379 U.S. 536 (1965) for the proposition that the City has a right to regulate the "time and place" of peaceful picketing. (Petitioners' brief, p. 12) There is nothing in *Cox* to support this bald conclusion, and Petitioners' reliance on *Cox* is misplaced. The portion of *Cox* cited by Petitioners related to a conviction under a statute making it a crime to "obstruct . . . any public sidewalk, street . . . or other passageway." (p. 553) The statute was held to be a violation of the right to freedom of assembly and speech because it was unconstitutionally *applied* and *enforced* by the municipal authorities. The Court did not discuss the validity of the statute *on its face* which is the sole question in the instant case. Respondent does not quarrel with the substance of the lengthy quote from the *Cox* opinion on page 12 of Petitioners' brief, but submits that this language is inapplicable to the case at bar. In the portion of the opinion relied on by Petitioners, Justice Goldberg, speaking for the majority, described how an ordinance aimed specifically at regulation of traffic could have a permissible incidental effect upon First Amendment rights. The statute held invalid in *Cox* was found not to "..... have as [its] specific purpose the regulation of traffic." (p. 553) Similarly, the ordinance here is not aimed at regulation of traffic around schools as is dramatically evidenced by the exemption in the ordinance allowing labor picketing within 150 feet of a school. Significantly, a

similar exemption for labor picketing was present in the ordinance in *Cox*. The Court's incisive comment on that exemption is strikingly apropos: "This exception [for labor picketing] points up the fact that the statute reaches beyond mere traffic regulation to restriction on expression." (p. 556 n. 14)

There is no doubt that the state has a valid interest in protecting schools from interferences and disruptions. However, the fact that the ordinance refers to schools does not *a fortiori* make it constitutional. In the recent case of *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969), this Court sustained the rights of students to wear black armbands in school as a means of protesting the Viet Nam war. It held that students *within a school* cannot broadly and absolutely be denied their First Amendment rights, and the state must show a "material and substantial" interference or disruption with the functioning of the school before it may intrude upon these rights of expression and free speech.

Petitioners bandy about phrases such as distractions, disruptions, disturbances and racial violence at public high schools, and, grasping at almost anything, they blithely cite *Newsweek* magazine statistics on "racial strife" and "arson attempts" in the nation's high schools (Petitioners' brief, p. 30) as grounds to sustain the ordinance. However, there is simply no issue of violence, threats of violence, disturbances or disruptions in this case, and the subject ordinance is not directed or limited to such problems. If the City of Chicago is concerned about violence or disruptions, it may specifically legislate on those matters. The ordinance evinces no "substantial and material" re-

lationship, as required by *Tinker*, between picketing and any interferences or disruptions of schools. It instead drastically overreaches by going far beyond such activities or any other manner or purpose for which picketing may be conducted and bans all exercises of free speech through picketing.

Petitioners seek to sustain the ordinance as a "reasonable regulation" by contending that a person is free to picket more than 150 feet from a school or at another time. (Petitioners' brief, p. 15) This argument has been made before and flatly rejected by this Court:

> One is not to have the exercise of his liberty of his expression in appropriate places abridged on the plea that it may be exercised some other place. *Schneider* v. *State*, 308 U.S. 147, 163 (1939).

See also, *Food Employees* v. *Logan Plaza*, 391 U.S. 308 (1968).

They further claim the 150-foot limitation is a "buffer zone" which they allege is required to shield schools from violence or disruptions.[6] The fear of the City over possible violence and disruptions and the possible affect of picketing upon others is the same fear that was urged by the school district in *Tinker* v. *Des Moines Independent Community School District*, *supra*, to defend its disregard for the First Amendment. This Court rejected that argument, stating:

> The District Court concluded that the action of the school authorities was reasonable because it was based

[6] Petitioners' analogy to a hospital zone of quiet is specious, as a hospital zone of quiet has only an incidental effect upon free speech (such as prohibiting loud noises), whereas the anti-picketing ordinance here is aimed solely at proscribing all exercises of free speech by means of picketing.

upon their fear of a disturbance from the wearing of the armbands. *But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.* Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello* v. *Chicago,* 337 U. S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society. (pp. 508-9, emphasis added)

See also, *Cohen* v. *California,* 403 U.S. ....., 91 S.Ct. 1780 (1971).

Nor can this claimed "buffer zone" be used to flatly deny citizens access to the public streets for expression of their views. This Court has recognized the importance of the public forum as a marketplace for the exchange of ideas:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. . . . *Hague* v. *CIO,* 307 U.S. 495, 515-16 (1939)
>
> . . . streets, sidewalks, parks and other similar public places are so historically associated with the exercise of the First Amendment rights that access to them for the purpose of exercising such rights *cannot constitutionally be denied broadly and absolutely. Food Employees* v. *Logan Plaza,* 391 U.S. 308, 315 (1968) (emphasis added)

Thus, the constitutional defect of the City of Chicago ordinance is that, on its face, it is not directed to any possible abuse of picketing, that is, an unlawful purpose or improper manner. Nor does the ordinance on its face attempt to reconcile any interest of the state with the historic and sacrosanct right of the citizen to peacefully express his views. Rather, it flatly and arbitrarily prohibits all picketing within 150 feet of a school, thereby flagrantly depriving Respondent of rights secured him by the First Amendment. This encroachment by the state on the right to peacefully picket under the guise of "reasonableness" is what Justice Black in *Gregory* v. *City of Chicago*, 394 U.S. 111, 118 (1969) (concurring opinion) termed a "meat-ax" ordinance—one which sweeps within its prohibition every type of conduct, including those that are protected by the First Amendment, as well as those that could be legitimately regulated.

The City of Chicago has effectively deprived Respondent of one of our most fundamental and sacred liberties—the right to speak and convince others of one's views and to seek change in a peaceful, orderly and democratic manner. It is submitted that Section 193-1(i) of the Chicago disorderly conduct ordinance is patently unconstitutional on its face.

II.

THE ORDINANCE ON ITS FACE VIOLATES THE FOURTEENTH AMENDMENT BY DENYING CITIZENS EQUAL PROTECTION UNDER THE LAW.

The Court of Appeals did not deem it necessary to consider Respondent's argument that the ordinance violates the equal protection clause by denying all citizens *except those engaged in a labor dispute* the right to picket or demonstrate adjacent to a school, because the Court found that the ordinance violates the First Amendment. The in-

vidious classifications in this ordinance in violation of the Fourteenth Amendment are inextricably bound to the denial of First Amendment rights, as Respondent is banned from peacefully picketing within 150 feet of a school while any teacher, janitor or other person "involved in a labor dispute" can picket free from this 150-foot prohibition. Hence, Respondent repeats here his argument as to why this ordinance flagrantly denies him equal protection under the law.[7]

The equal protection clause permits classifications which are reasonable in nature and not arbitrary and invidious. The Court in *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1958) defined the test under the equal protection clause:

> . . . there is a point beyond which the state cannot go without violating the Equal Protection Clause. The state must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. (p. 527)

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[7] The City argued at trial that the federal government pre-empted the field of labor relations, thereby requiring the exemption in the ordinance. Petitioners concede on page 27 of their brief that the pre-emption argument is spurious because the National Labor Relations Act does not cover states or subdivisions thereof, as they are not considered "employers" under Section 152 of the Act (29 U.S.C.A. §152). This same argument has been rejected in other cases. *City of Alcoa* v. *IBEW Local 760,* 203 Tenn. 12, 308 S.W.2d 476 (1967); *International Longshoremen's Association* v. *Harris County—Houston Ship Channel,* 358 S.W. 2d 648 (1962).

See also *Southern Railway Co.* v. *Greene*, 216 U.S. 400 (1909); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

Moreover, it was observed in *Williams* v. *Rhodes*, 393 U.S. 23, 39 (1968):

> When fundamental rights and liberties are at issue, a state has less leeway in making classifications than when it deals with economic matters. (Justice Douglas, concurring opinion, reiterated in *Kramer* v. *Union Free School District*, 395 U.S. 621 1968).

See also *Loving* v. *Virginia*, 388 U.S. 1 (1967).

Applying these fundamental principles to the case at bar, the flaw in Chicago's ordinance is manifest.

Petitioners have taken the position that tranquility at the schools is the goal of the legislation. Respondent does not argue with this most laudable purpose. But, Respondent urges that the unreasonable distinction between labor dispute picketers and all others bears no relationship to that purpose. Petitioners ask this Court to sanction a classification which on the one hand bans the admittedly silent peaceful picketing of Respondent, interfering with and disrupting no one, but on the other hand permits dozens of labor pickets to encircle a school from morning until night. Petitioners obviously realize that this distinction is invidious, for they resort to the position in their brief that labor disputes are peaceful while *all* other picketing and demonstrations are not. (Petitioners' brief, pp. 29-30) To illustrate the absurdity of this position, one only has to compare the admittedly peaceful march of Respondent with the almost daily reports of violence and threatened violence connected with labor disputes.

Thus, not only does the ordinance arbitrarily create classifications of citizens which bear no substantial relation to the stated goals of the ordinance, but the City of Chicago is attempting to discriminate as to what views may peacefully be expressed on the public way. Although there are no other decisions of this Court concerning similar exemptions for labor picketing, Justice Black in his concurring opinion in *Cox* v. *Louisiana, supra*, addressed himself to this issue as the statute in *Cox* (cited on p. 11) contained a like exemption for labor picketing.[8] Justice Black stated:

> . . . by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an *invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.* (p. 581, emphasis added)

In the consolidated case relied on by Petitioners on Page 30 of their brief, the Supreme Court of Illinois held that an ordinance of the City of Rockford, Illinois, identical to the Chicago ordinance in question, was not violative

[8] As noted previously (p. 11), the majority opinion was based upon violation of the First Amendment by reason of the uneven enforcement and application of the statute.

of the equal protection clause. *Rockford* v. *Grayned*, 46 Ill. 2d 486 (1970) It is submitted that the Supreme Court of Illinois overlooked the controlling principles cited above as it apparently was willing to give carte blanche authority to the legislature to establish classifications as to who may picket a school.

The Court in *Grayned* simply stated that there may be a reasonable basis upon which the City of Rockford could classify labor picketing differently than other picketing. But the Court only went half way. What it failed to do was to determine whether these classifications bore a substantial and reasonable relation to the goals sought to be attained—tranquility of the schools—and further to determine the effect of these classifications upon preferred First Amendment rights. As demonstrated earlier, the exemption for labor picketing bears no reasonable relationship to preserving tranquility of the schools. Furthermore, the ordinance's crippling effect on the exercise of rights secured by the First Amendment for all persons not involved in a labor dispute, makes it clearly repugnant to the First Amendment as well as to the equal protection clause of the Fourteenth Amendment.

Had Respondent or a teacher sought to picket for higher wages or shorter hours for teachers or claiming that the Board of Education discriminates against the hiring of black teachers, the 150-foot ban would not apply. Yet, because Respondent picketed asserting that black students were discriminated against he is prohibited from expressing these ideas by means of a sign on the public sidewalk

adjacent to the school. The Constitution does not tolerate the distinctions occasioned by this ordinance.[9]

Finally, in obvious desperation, Petitioners, recognizing that the ordinance violates the equal protection clause, suggest that the labor exemption should be severable. Petitioners' reliance on *Davis* v. *Wallace*, 257 U.S. 478 (1922) to support this argument is totally misplaced, for the Court in *Davis* held the invalid portion of the statute in that case was not severable. The reasoning of the Court, conveniently overlooked by Petitioners, answers why the labor picketing exemption in the instant case which was *part of the original enactment* cannot be severed and the entire ordinance must fall:

> *Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly.* Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the state law of the state; and no other authority is competent to give them a larger application. (pp. 484-5 emphasis added)

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[9] Petitioners' argument that the exemption for labor picketing is permissible since strikes by public employees are enjoinable under Illinois law is unfounded (Petitioners' brief, p. 29). The labor exemption applies to more than strikes by public employees. It allows janitors, teamsters or anyone else to picket a school concerning an issue involving a labor dispute. In addition, simply because a strike by public employees can be enjoined in a civil action, it does not follow that an exemption for labor picketing in a *criminal* ordinance is meaningless, for the ordinance thus permits public school employees to picket free from the *criminal* sanctions that are imposed on all other classes of people.

The City of Chicago ordinance is a flagrant violation of the equal protection clause of the Fourteenth Amendment and for this reason also, the ordinance must be held unconstitutional.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that §193-1(i) of the Municipal Code of the City of Chicago is unconstitutional and the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

RONALD L. BARNARD
221 North La Salle Street
Chicago, Illinois 60601

HARVEY J. BARNETT
105 West Adams
Chicago, Illinois 60603

HAL M. BROWN
120 South La Salle Street
Chicago, Illinois 60603
Attorneys for Respondent